In the

Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

INTERNATIONAL VAN LINES,

Respondent.

No. 71-895

Washington, D. C.
October 12, 1972

Pages 1 thru 35

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

NATIONAL LABOR RELATIONS BOARD, Petitioner,	:	
v.	:	No. 71-895
INTERNATIONAL VAN LINES, Respondent.	:	

Washington, D. C.
Thursday, October 12, 1972

The above-entitled matter came on for argument at 1:45 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

PETER G. NASH, General Counsel, NLRB, Washington, D. C. 20570, for the Petitioner.

NORMAN H. KIRSHMAN, ESQ., 315 South Beverly Drive, Beverly Hills, California 90212, for the Respondent.

C O N T E N T S

- - -

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 71-895, the National Labor Relations Board against International Van Lines.

Mr. Nash, I think you may proceed now.

ORAL ARGUMENT OF PETER G. NASH, ESQ.,

ON BEHALF OF THE PETITIONER

MR. NASH: Mr. Chief Justice, and may it please the Court:

This case is here is here on certiorari to the Ninth Circuit which denied enforcement of provisions of a National Labor Relations Board order requiring the reinstatement of four employees who were engaged in a strike when they were discharged by their employer. The question presented here concerns the protection which the National Labor Relations Act affords to employees engaged in a strike against their employer for an economic objective, who are discharged for that activity before they have been permanently replaced by that employer.

Thus, do such strikers have an unconditional right to reinstatement to their former jobs as the Board found, or is that right to reinstatement lost if the employer controls substantial and legitimate business justifications for refusing to reinstate them as the court below found?

The facts may be briefly summarized as follows. In August, 1967, the Teamsters Union commenced an organizing campaign amongst employees of ten to eleven moving and storage companies within the Santa Maria, California area, including the respondent, International Van Lines.

On September 21st, the union that had obtained authorization cards from five of six International employees filed a representation petition with the National Labor Relations Board, a copy of which was then served upon the company and received by it on September 25th. A week later, on October 2nd and 3rd, this union held meetings at which union representatives told the employees that certain companies being organized, including International, had withdrawn their consent for an NLRB election. There was also some discussion at that time about the discharge of the employees of other companies other than International.

In any event, the assembled employees decided to strike and did so on October 4th. Three of International's employees--Dicus, Manuel Vasquez, and Mr. Casillas--refused to cross the picket line, and a fourth, Robert Vasquez, did not report for work that day because of the picket line.

The president of International, Robert McEwen, obtained temporary replacements the next day, October 5th, from his brother, who had a similar moving and storage company within the area, and sent telegrams to Manuel and

Robert Vasquez and Dicus, advising them that they had been permanently replaced.

Seven days later, on October 12th, the union had filed charges with the National Labor Relations Board alleging that Manuel and Robert Vasquez, Casillas, and Dicus had all been discriminatorily discharged in violation of the National Labor Relations Act.

Between October 8th and October 28th, Dicus and Manuel Vasquez each asked the president of the company, Mr. McEwen, who was then hospitalized, whether each was going to have a job, and neither received any commitment.

Dicus had the same experience shortly after Mr. McEwen left the hospital on October 28th. In the latter part of November, Casillas, who had prior to that time been a casual worker, asked Mr. McEwen to put him back on the availability list for calls. He received no particular commitment, and he had not by the time of the hearing been recalled to work.

On October 12th, Robert and Manuel Vasquez and Dicus asked Mr. McEwen to be reinstated and were refused. The strike continued on at least through the hearing, which commenced on April 3, 1968.

The Board found that the company's employees were engaged in a protective strike to compel a consent election and that even if the object of the strike was to compel

immediate recognition by the company of the union, it was a protected strike.

Further, the Board found that Manuel and Robert Vasquez and Dicus were discharged by the telegram sent on October 5th, for as a matter of fact they had not been permanently replaced at that time. And, further, that all four employees, which included Casillas, the casual employee, were refused reinstatement upon their unconditional offers or applications for reinstatement, which further violated Sections 8(a)(3) and (1) of the National Labor Relations Act.

The Board ordered reinstatement of all four of these employees even if that reinstatement required the discharge of strike replacements which may or may not have been hired since the time of the discharge and the refusal of reinstatement of these employees. The Ninth Circuit found that all four of the employees had been discharged on October 5th for engaging in a protected strike which sought a consent election, that none had been permanently replaced up until that time, and that, as such, those discharges violated sections 8(a)(1) and (3) of the National Labor Relations Act.

The court further found that three of the strikers, excluding Casillas at this point, the casual, made unconditional requests for reinstatement which were denied,

and that Casillas had made a similar request but because he was a casual employee, it was not clear to the Ninth Circuit whether in fact he had been denied reinstatement or whether there just had not yet been an opportunity to the employer to call him back to work. The court remanded that latter issue to the Board.

However, despite these findings and despite an assumption by the Ninth Circuit that employees who struck after the discharge of these employees, who continued their strike, might in fact be properly considered to be unfair labor practice strikers, the court held that the discharged strikers remained economic strikers, finding that to be their status at the time they were in fact discharged.

Accordingly, although these employees had not been replaced when fired, the court found that they were not entitled to reinstatement if the employer had a legitimate and substantial business justification for refusing to reinstate them, which includes the hiring of permanent replacements since their discharge.

The court remanded the case to the Board to make this determination. In argument, I think it might be helpful to discuss initially some of the general principles involved in this area which are not, in my judgment,disputed. Thus, there is no dispute between the parties concerning the validity of the consistently recognized distinction between

the reinstatement rights of unfair labor practice strikers and economic strikers.

Unfair labor practice strikers are those whose strike activity either begins or is prolonged or aggravated by reaction against employer unfair labor practices; and economic strikers are generally everybody else. Economic strikers are entitled to reinstatement at the end of their strike, unless the employer controls some substantial and a legitimate business justification for failing to reinstate them, such as the continuing presence of permanent replacements in their jobs. The theory here is that although the employer may not discriminate against those strikers, he does have a legitimate interest in operating his business during the strike and may, in the balancing of the interests and equities involved, obtain permanent replacements for those strikers.

Unfair labor practice strikers, on the other hand, are entitled to unconditional reinstatement, regardless of the employer's business justification for not reinstating him, including the presence of permanent replacements. The theory here is that such strikers are acting to protect themselves against the illegal acts of the employer which violate the act. And, although the employer can and has a legitimate interest in operating his business during the strike, he may not penalize his employees by permanently replacing them for

the acts which they have taken really in response to his transgression.

Further elaborating on the foregoing, it is also clear that a strike that starts as en economic strike may in fact become an unfair labor practice strike, thus converting the economic strikers into unfair labor practice strikers where the employer's commission of an unfair labor practice has the effect of prolonging or aggravting the strike.

And finally and apart from the discussion of unfair labor practice and economic striker, that distinction, it is also clear that the discharge of economic strikers for strike absences before they have been permanently replaced is discrimination and violates sections 8(a)(3) and (1) of the National Labor Relations Act.

As I say, up to this point I think there is no disagreement between the respondent and the petitioner nor indeed by the court below.

Q Is that what this case is about, even though a person who is fired before he is permanently replaced is-- what if he is fired but then permanently replaced?

MR. NASH: That is what this case is about. And if that is a protected strike, then in fact he has under all previous decisions--

Q He does not cease to be an employee until he

is permanently replaced; is that it?

MR. NASH: That is correct.

Q The only way the employer can terminate him is by replacing him?

MR. NASH: By permanent replacement, that is correct. He may not fire that employee. And if he fires that economic striker, if he fires the economic striker prior to the time that that striker has been replaced, then that striker has the unconditional right to return to his job.

Q If he replaces him permanently, then he may say to him, "You're fired"?

MR. NASH: That issue is not involved in this particular case, and that gets into a question of the Fleetwood and Laidlaw cases which extend additional rights to economic strikers, even replaced economic strikers, the right to go on a seniority register, if you will, and be called back, other than discriminating against them by hiring someone in their place later on.

Q You may never really completely terminate the rights of a totally replaced striker?

MR. NASH: The full extent of the Fleetwood and Laidlaw doctrines of the Board I don't think have been fully explicated or examined either by this Court or by the Board. That issue, however, is not involved in this particular case.

Q Did not Mackay intimate that once a guy was

replaced, that was pretty well the end of it, if he was legitimately replaced under the doctrine you have established?

MR. NASH: Yes, but that preceded by some number of years the Fleetwood decision of this Court and the ultimate Laidlaw decision of the Board, which gives meaning I think to the Fleetwood decision.

Q Did Fleetwood, at least in part, overrule Mackay?

MR. NASH: To the extent that Mackay indicated that perhaps an employee could be discharged and his employment status completely eliminated or terminated by reason of his replacement to the extent that what I would call dicta in that case is different than Fleetwood, yes. It is implicitly an extension of rights.

The court below, however, did find in this case that all four of the strikers were discharged before they had been permanently replaced; they could not as a matter of law require any greater reinstatement rights than those of economic strikers. That was the status that they held at the time of their discharge. And this is true in the Ninth Circuit's view, even if those discharges converted the strike in question and the strikers, the non-discharged strikers, into unfair labor practice strike and into an unfair labor practice group of strikers. I think that the

court's position is erroneous for at least two reasons.

First, wholly apart from whether the four dischargees became unfair labor practice strikers or not, the respondent, because of its action in unlawfully discharging them as an unconditional obligation to reinstatement, the classic remedy for an unlawful discharge of an employee is unconditional reinstatement, for that is the best way to restore the status quo ante. This holds true whether the dischargee was unlawfully discharged from active duty or whether he was unlawfully discharged from the picket line before he had been replaced.

In the latter case, the striker, not having been replaced at that time, at the time of his wrongful discharge, had an unconditional right to return to work. He was terminated from that position; and, in order to replace and put things back in the status quo, that wrongfully terminated striker should be in the same position that he was in before he was discharged, which is the position of an economic striker with an unconditional ability to return.

Thus, the circuits have uniformly held that without regard to whether the strike subsequently takes on the nature of a protest against an employer's unfair labor practice, that that employer may not lawfully terminate economic strikers prior to the time they have been validly replaced, and that the appropriate remedy, therefore, is

reinstatement, even if that requires the displacement of post-firing replacements.

Just as an employer may not deny reinstatement to an employee unlawfully discharged while he is actively working, on the grounds that he subsequently replace that discharged employee, so too a striking employee can have no less protection. To hold otherwise, I think, would be to recognize a distinction between non-strike concerted activities, protected by Section 7 of the National Labor Relations Act and strike activities similarly protected. Congress did not authorize such a distinction to be made and rightly so, for no one can deny that the right to legally strike is one of the paramount protected activities under the National Labor Relations Act and, indeed, Congress so recognized specifically in passing Section 13 of that act.

Secondly and contrary to the court below, the Board could properly find that by continuing to strike after their unlawful discharge, the four dischargees in this case became unfair labor practice strikers. It is, I submit, a reasonable inference for the Board to make that dischargees have added to their protests against their employer their unlawful discharge. And, further, that the unfair labor practice of firing a striker has such an effect upon a strike is to tend to prolong it. At the very least, the Board in the exercise of its expertise, may, I submit, properly

conclude that the discriminatory and unlawful discharge of strikers is so likely to have an impact upon the strike itself that such an act by the employer shifts the burden to that employer to show that the strike was not in fact impacted by the illegal discharges.

Q Mr. Nash, what do you think the record shows here as to that detail, that it did or did not have an effect on the prolongation of the strike?

MR. NASH: That is the second part of the argument here, and I believe that the record shows quite clearly that it did have an effect upon the prolongation of the strike and certainly upon the prolongation of the strike by these four employees or, in fact, they unconditionally asked to be reinstated, were denied that request, and continued on strike, and that was back in December of 1967, and continued as strikers at least on through April 3, 1968. So that I think without question, at least as to those four particular employees, the strike continued well on past what it would have, had their original grievance been resolved.

Q Incidentally, now that I have you interrupted, does the record show whether they knew why they were striking?

MR. NASH: The record indicates that some of these four employees did know. One of them, at least, was present at the meeting with the union at which the employers

believed withdrawal of his consent to a Board election was one of the circumstances that prompted the strike.

Q You say that the Board was justified in making the assignments. I take it you complain that the Court of Appeals did not give full weight to--what is the question before us, then, under Universal Camera and Pittsburgh Steamship? We do not simply sit in the place of the Court of Appeals and say would we have upheld the court, do we?

MR. NASH: The Court of Appeals merely said that even assuming that this now becomes an unfair labor practice strike, after you have discharged these four employees, because the four employees were themselves economic strikers at the time they are discharged, there was no way as a matter of law, no matter what the Board may show as a matter of fact, that those four people can ever become other than economic strikers, because that is the status that they held at the time of the discharge. And my complaint that I bring to you today is that the Ninth Circuit is as wrong as it can be in making that kind of judgment; as a matter of law, they are wrong. That not only do those employees under the facts in this case become unfair labor practice strikers with full rights to reinstatement, but, furthermore, even if they are economic strikers and remain economic strikers, they are fired economic strikers who at the time they were fired had not been replaced by anyone else and

thus have the unconditional right to return to work on that day, because they had not been replaced; and that the appropriate remedy for that situation is to put them back into the situation they were in when they were discharged, which is an unconditional right to reinstatement, regardless of what happened after the day that they were discharged.

Q Does it make any difference as to the time when the claimed unfair labor practice occurred in relation to the time of their conversion from being economic strikers to unfair labor practice strikers?

MR. NASH: Yes, I think--

Q Before any unfair labor practice occurred.

MR. NASH: They were permanently replaced before an unfair labor practice occurred. That issue is not presented in this case. But, in my judgment, they would then be permanently replaced economic strikers who would not have the unconditional right to return.

Q So, their conversion, if we can call it that, must relate to an unfair labor practice which had existed while they were economic strikers; is that what you are telling us?

MR. NASH: If there is in fact to be a conversion rather than the strike starting initially as an unfair labor--yes, there must be unfair labor practice and then they become unfair labor practice strikers.

Q In effect, then, could it be said that they were striking in a dual capacity from the outset here?

MR. NASH: No, because they were not fired until the second day of the strike. Initially they could not have been obviously objecting to their discharge, because they had not yet been discharged.

Q But it comes under some other kind of an unfair labor practice?

MR. NASH: Yes. They could very well have been dual purpose strikers, in which event they would be unfair labor practice strikers, unless the employer can come forward, I believe with compelling evidence to disentangle the morass that he himself has caused by committing unfair labor practices and showing as a matter of fact that the unfair labor practices had nothing to do with the strike or the prolongation of the strike.

Q Mr. Nash, in answer to the Chief Justice you suggested in a hypothetical case that had they been replaced before they were discharged, then that would be no unfair labor practice and they would be out.

MR. NASH: Had they been permanently replaced?

Q Yes. They would be out?

MR. NASH: Yes, they would be--at the time they were fired--

Q My question, How is that consistent with the

answer you gave Mr. Justice Rehnquist before as to the effect of Fleetwood on this Board case?

MR. NASH: That is inconsistent with the answer I gave Mr. Justice Rehnquist to this extent: When I mean they are out, I mean they are then replaced economic strikers at the time that they are fired, and they would be returned to the position of replaced economic strikers, which would mean that they do not have the unconditional right to return to work but may have the subsequent Fleetwood and Laidlaw rights, which would be the rights to come back when rights do in fact occur.

Q Your position depends entirely on chronology, on which happens first really, the discharge or the permanent replacement. If one happens a day before the other, one result ensues. If it is just the reverse by one day--

MR. NASH: I think strictly speaking, yes, the employer has a right during an economic strike to permanently replace strikers. And to the extent that the employer does that, he commits no violation of the National Labor Relations Act. If the next day--

Q He makes no violation by what, by not re-employing the striker?

MR. NASH: First of all, he does not commit it by employing a permanent replacement.

Q Right.

MR. NASH: If on the next day he fires a striker, even though he has been replaced, he commits a violation of the act. He violates Section 8(a)(3); he has discriminatorily discharged a striker. He has taken away whatever rights the Fleetwood and Laidlaw may give him. Let us assume no discharge on the second day; the strike ends and the striker says, "I now want to come back to work." The employer then says, "You have no unconditional right to return to work because you were replaced, permanently replaced. You will go on a Laidlaw list, if you will, and when an opening occurs, I will be calling you under those circumstances." And although that issue is not present in this case, there would be no violation in the refusal to reinstate at that point.

Q Mr. Nash, is the case really as simple as chronlogy. Mr. Justice Blackmun referred to the discharge happening on one day and replacements being employed the next day. Suppose it would happen within an hour or ten minutes. Are there any principles involved or does it just depend on whether the employer was smart enough to say, "I hire you to replace John Smith," and then advises John Smith, "You are fired," or whether he reverses that process?

MR. NASH: I do not know of any case on the books, but in the different capacities as General Counsel, as an investigator and prosecutor of unfair labor practices, I

would look carefully at that set of events that you just posed to see if, in fact, that that was not a ruse and what was not in fact intended was a discharge before replacement in both circumstances. And there might very well, under the facts of that case, be found to be a violation. But given a clean, permanent replacement and a subsequent refusal to reinstate, there would not, in my judgment, be a violation.

Q That would be entirely a factual determination, would it not?

MR. NASH: Yes, the latter would be.

Q On a case by case basis. You could not have a general rule about that, could you, except that subterfuge, to the extent that would be a principle, that subterfuge would be penetrated.

MR. NASH: Right. I think that the only general principle is that you cannot discriminate against people because they exercise their rights under Section 7 of the act and that, whether there is discrimination or not, obviously involves a factual question in each case.

I think the problem created by this case can best be put in focus by a practical hypothetical. Under the circumstances now allowed by the Ninth Circuit, an employer during an economic strike fired all of his economic strikers. At that point, if the Ninth Circuit's decision stood, those employees would have no unconditional right to return to work

unless they immediately came in and said to the employer, "We want to come back to work unconditionally at this point," before they had been permanently replaced. That adds an additional risk to the risk of an economic striker, which I do not think is justified in law nor by any of the decisions prior to the time that the Ninth Circuit came down with its decision. It adds an additional risk that the employees must immediately come back in--the strikers must immediately come back in and say, "We give up our strike, we want to come back to work," a risk that they do not have as economic strikers. For, although they might be permanently replaced, the goal of that replacement has not come to their attention immediately, they do not feel that kind of compunction to give up their strike, and I submit to allow the Ninth Circuit's decision to stand in essence means than an employer can break strikes by violating the act. Thank you very much. I will save the rest of my time, if I may, for rebuttal.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Nash.

Mr. Kirshman.

ORAL ARGUMENT OF NORMAN H. KIRSHMAN, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. KIRSHMAN: Mr. Chief Justice, and may it please the Court:

I think the essence of the case before you and the holding of the Ninth Circuit is very simple. The Ninth

Circuit has held for a rule of evidence. The Ninth Circuit has said, "We will not call an automatic conversion of an economic striker to an unfair labor practice striker without substantial evidence that the unlawful act of the employer has prolonged the strike." And I refer the Court to page 34 of our brief on the merits, quoting from the Court. The court points out in the middle of the page that the Board has made a finding, the Board has argued that the employer's unfair labor practices substantially prolonged the strike, were a significant factor in the strike. And then the court concludes by saying, "The Board adduces no evidence in support of this necessary effect."

We submit that the Ninth Circuit has done no more and no less than say that it will not accept a per se conversion, because the essence of an unfair labor practice striker is an individual who is on strike protesting the unfair labor practice. It is a question of cause and effect. And cause and effect must necessarily require evidence.

The Ninth Circuit is not alone,with all due respect to the General Counsel; the Ninth Circuit is in the company of the Second Circuit and the Third Circuit and the Seventh Circuit in the Thompson case, in the Frick case, and in Jackson Printing. In each case the circuits recognized the cause and effect situation and required evidence. I think that the Board has the burden, if it is intending to impose

a severe restriction of unconditional reinstatement, of proving that the conduct of the employer prolonged the strike and the court below merely said that the economic strikers were on strike for a prior complaint, that there was no unfair labor practice strike at the time they went on strike, and that the employer's conduct, though unlawful, may or may not have had a bearing on their continued picket line conduct. And I respectfully refer the Court to the fact that the record shows that with the exception of the December 12th request for reinstatement, all other requests as late as April a few days before the hearing in the case were predicated and conditioned upon the signing by the employer of a contract and not any contract but a specific contract.

Q Were these employees permanently replaced?

MR. KIRSHMAN: The finding of the Board was unclear on that issue, sir, and for that reason the court remanded--the court said that they were not--no, may I correct myself? The court said that they were not permanently replaced at the time of the unlawful discharge. But the court said that the record was unclear as to whether they were permanently replaced before they applied for reinstatement, and that was one of the issues upon which the court remanded to the Board for further proceedings to determine whether there were substantial business justifications.

Q How could an employer refuse to reinstate a

striker if he had not been permanently replaced?

MR. KIRSHMAN: There were temporary replacements hired. He cannot legally refuse to reinstate if they have not been permanently replaced. But the court did not find and the Board did not make it clear as to what the situation was when the employees applied for reinstatement. There were two issues. One was--

Q What difference would it make when they applied if they had been permanently replaced?

MR. KIRSHMAN: If they were economic strikers, they were only entitled to reinstatement if they had not been permanently replaced.

Q Until they have been permanently replaced, they have got a right to reinstatement.

MR. KIRSHMAN: That is true.

Q Why are the people in this case entitled to reinstatement absent the finding of having been permanently replaced?

MR. KIRSHMAN: Because the record was not clear that at the time they applied for reinstatement--

Q Why should we dream up an issue; assuming they had been replaced, what would the law be? Why do we dream that issue up if there has not been a finding on the facts that they have been permanently replaced?

MR. KIRSHMAN: The court remanded it on that issue,

sir. At the time they applied for reinstatement. The court held that when they were discharged, they had not been replaced.

Q Did the employer make any effort to prove that they had been permanently replaced?

MR. KIRSHMAN: The employer put in payroll records showing that certain employees were on the payroll.

Q But did the employer take the position that they had been permanently replaced?

MR. KIRSHMAN: I cannot answer that, Your Honor. I do not think that the record is clear on it.

Q I am saying in the absence of a finding that they had been. I gather it is conceded they were economic strikers from the beginning.

MR. KIRSHMAN: Yes, Your Honor.

Q Is it the rule in MacKay that at the time of application they are entitled to their jobs back unless they have been permanently replaced; or is it the employer's burden to show that they had been if he is to withstand the application of evidence?

MR. KIRSHMAN: We submit that the employer has the burden of showing that they have not been permanently replaced; yes, Your Honor. That they have been permanently replaced.

Q Telegrams that were sent to them said, "You

are being replaced," speaking of a future time. So that unless they did something after that to clarify it, you have a very muddy picture, have you not?

MR. KIRSHMAN: That is exactly the picture that the Ninth Circuit had before it, Your Honor.

Q The Board takes the position that it does not make any difference whether they were permanently replaced; as long as they were fired beforehand, you do not need a finding about--

MR. KIRSHMAN: That is the position of the Board, Your Honor. And the position of the Board is that that result occurs regardless of the evidence, whether or not there is any evidence. And, as I said, we submit that the Second, Third, and Seventh Circuits provide for a more rational view of the case.

I would like to proceed at this point to an issue that may or may not be before the Court, but respondent has included it in its brief and in the answer which we feel was in the nature of a cross-petition. And that question is fairly comprised within the question of reinstatement and threshold to it. Before you can reach the question of reinstatement, we must have a finding of unlawful conduct in the first place, and we believe that in our supplemental brief, which was filed with the Court, that the 90-day period does not run from a jurisdictional standpoint and

that the Court may consider this issue, if it feels that the issue is worthy of consideration. As we have discussed, the decision of the Ninth Circuit was not a final decree. The employer was under no obligation to do anything at that point. The case was sent to the Board for the taking of further evidence. Therefore, we feel that there was no final judgment for purposes of the 90-day period in respect to a petition for certiorari.

The issue that we would like to address ourselves to is whether a strike to force the employer to consent to an election, in effect to force the employer to forego his access to the Board, is protected activity. And we have set out in our brief the legislative history and the actual wording of the statute and the regulations. And we conclude, with all humility, that the employer has an absolute right to his hearing in a representation case. This is a statutory right. There was disagreement in the Congress in 1947 as to whether there should be provisions for pre-election, for pre-hearing elections, and the majority in the Congress determined that the hearing was important enough so that it was set forth in mandatory terms. The access to the Board for the hearing is critical. It provides, one, a question into the jurisdiction of the Board, in the first instance, the appropriateness of the bargaining unit, eligibility to vote, and collateral issues.

A strike to force the employer to forego this hearing we submit is a strike in derogation of the orderly processes of the Board. It is an invitation to a labor union to stand up and say, "We will strike unless you forego your right to have the regional director and the Board determine whether this election should be held in the first place and, if it is held, who should vote." We do not believe that this is in the interest of the national labor policy. We do not believe it is consistent with the spirit of the Boys Market case. We do not believe it is consistent with those cases that indicate that arbitration is preferable to a strike or a muscle-to-muscle confrontation.

Q Is this an argument that in fact this was an unfair labor practice strike on the part of the union?

MR. KIRSHMAN: Yes, Your Honor.

We believe further that to compound this problem, this particular strike had a dual facet. The Board found alternately that it was a strike to force the consent and also could have been a strike for recognition. I already covered the question of a strike to force a consent. In respect to a strike to force immediate recognition, I submit to the Court that the failure by the union to notify the employer in any manner other than by receipt by the employer from the Board of the petition itself and the failure by the union to comply with the Board's regulations

in Section 9(c)(4) of the act, which requires an allegation in the petition of a demand for recognition and a refusal, that this basic jurisdictional defect in that petition rendered the petition a nullity. I think that in the context of the union's activity here in fabricating--and this is a finding by the trial examiner which was not disturbed by the Board or the court, that the union here fabricated a labor dispute, willfully fabricated a dispute on a non-existent grievance that in the context of that fabrication the failure to allege in the petition that there was a demand, that there was a refusal, renders that petition fatally defective; and the picketing which continued for more than 30 days, with such a fatally defective petition, in our opinion, rendered that strike a violation of Section 8(b)(7) of the act. And the authorities are quite clear that an employer has no obligation to reinstate any striker who strikes in violation of 8(b)(7) of the act.

I think that we have a basic question before the Court on the consent and/or recognition issues, and that question is, Do the processes of the Board prevail? Are they available to the employer in the same fashion that they are available to the employees? Is the mandatory language of Congress--and Congress did not say "may," it said "shall"--is the language of the implementing regulations which says that upon the filing of a petition in accordance with the

rules and regulations prescribed by the Board, are they not set up as a condition precedent to the processing of a valid petition?

Or, on the alternative, do we say that the right to strike is so powerful, is so important--and we do not undermine that right, it is powerful, it is important, but where is the balance? Do we invite labor to ignore the Board, not on peripheral issues but on a basic due process issue, the question of the employer's right to a hearing? I submit that that is what the Court is faced with on the underlying threshold issues which in respondent's view are far more significant and far more important than the rule of evidence which has been promulgated by the court below.

We can live with a rule of evidence. A rule of evidence can be interpreted very strictly by the Board. I think if the Board clearly said in this case that the company failed to sustain its burden of proof, if it has such a burden, that the unfair labor practices did not prolong the strike, I might be able to accept that as a lawyer. But the Board did not say that. The Board urges an automatic per se conversion theory, notwithstanding the evidence, notwithstanding whether the unfair labor practice occurs one day before the strike, six months before the strike, six months after the strike, a per se rule. And I believe in the law, especially in the law of labor relations. Per se rules are

very dangerous. Much in the practice of labor law and much in our functioning here in labor relations is not so much what the employer does, it how he says what he does. And, for example, if an employer says, "I am going to discharge you or I am going to replace you," there are entirely different connotations that the Board could place upon this semantical difference. Basically, these are our three issues. The consent--a strike to for a consent is not protective activity, and the cases cited by the Board do not support that proposition, Your Honors.

I would like to comment briefly on Washington Aluminum, which is cited by the Board as this Court's authority for the fact that a strike for immediate recognition or any protest without notice is still protective activity. I refer the Court to the fact that in Washington Aluminum there was no labor union. The employees were not represented and the employees had an instant sit-down strike based upon working conditions, a cold shop. That is a far cry from International Van, where there was a labor union, a petition filed with the Board, and a fabricated reason for the strike. I submit that as a further argument for the unprotected nature of these activities, is that there was no labor dispute, and I am well aware of the MacKay language which talks about the wisdom or unwisdom of the employee's activities in going on strike.

Q Are you arguing there should not have been a remand?

MR. KIRSHMAN: I am arguing that the Court of Appeals, Your Honor, should have--

Q You did not cross-petition?

MR. KIRSHMAN: We believe we did, Your Honor. Our answer was in the nature of a cross-petition, and we believe that it was timely, and we believe that there is such plain error in this record--

Q You can support the judgment below on any ground available to you, but you cannot get any more than you got below.

MR. KIRSHMAN: We feel that quite possibly, Your Honor, that we are entitled to more than we received below because our answer--

Q You did not follow the ground rules, did you?

MR. KIRSHMAN: I think we do, sir, with all due respect. Our answer was filed, raising new issues. And, although it did not label itself as a cross-petition, I think that the fact that we attempted to raise new issues, if we are not jurisdictionally untimely--

Q Wait, wait, wait, wait. In addition to the question presented to the Board, respondent respectfully submits the following additional question.

MR. KIRSHMAN: Yes, Your Honor.

Q As Mr. Justice White asked, really what you wanted was a denial of the question of the Board's order.

MR. KIRSHMAN: In its entirety.

Q In that way it was a remand to the Board for further proceeding.

MR. KIRSHMAN: That is correct, Your Honor. But we got the remand on the issue that we were not as concerned about.

Q That is just it. That is why I wondered whether without it--maybe it sounds rather technical, but ordinarily if you want to raise an issue which gives you a different judgment than you are here to defend, you have to cross-petition, do you not?

MR. KIRSHMAN: We believe that the document trial--yes, Your Honor. And, further, Your Honor, we believe under the Court's rule 23(1)(c), if the Court believes that the issues are so interrelated that you cannot reach a question of damages, which is the question of remedy, without reaching the question of liability, that perhaps the Court in its discretion could take it.

Q Did you deliberately choose the form you did rather than cross-petition?

MR. KIRSHMAN: No, Your Honor. I must confess this is my first trip before the Court and I fumbled somewhat.

I would like to comment just briefly on one more

issue, and that is the question of the labor dispute, whether or not there was a labor dispute. I believe that under the facts in this case the one element of MacKay, which talks about the mistaken judgment of the employees or the wisdom or unwisdom of going on strike for a reason which is not correct implies good faith. I think when you examine a willful fabrication of a reason to go on strike, the element of a good faith mistake disappears, and we open the door to permitting employees or a union or a union representing employees to fashion a labor dispute out of thin air any time they want to bring the conduct within the purview of the act. And, once again, I believe that Section 2 of the act says quite clearly or at least implies that the Board has no jurisdiction to inquire into a dispute which is not a labor dispute. And, there again, in my attempt to bootstrap, I would believe that this Court could inquire into a jursdictional error, even if not raised in the court below. But we did raise these issues at trial. They were commented upon by the trial examiner. And I believe that they have merit and should be considered by the Court.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Kirshman.

Mr. Nash, do you have anything further?

MR. NASH: No.

MR. CHIEF JUSTICE BURGER: The case is submitted.

[Whereupon, at 2:30 o'clock p.m., the case was submitted.]

- - -